93. Moreover, the parties were aware that the Commission had never before applied the provision of the multiple ownership rules to an arrangement such as the one involving NMTV. May confirmed that he considered the NMTV application "somewhat unique," since the amended rule had not yet been applied to a nonprofit public charity. Tr. 3379. Indeed, both May and Crouch understood that NMTV was the first applicant seeking the benefit of the exception to the rule. TBF Exh. 105 at 16; Tr. 2674. In this regard, as the ALJ noted, Crouch and May emphatically testified that Crouch had explicitly instructed May to make full disclosure of material facts to the Commission in connection with the Odessa application.[20] Tr. 2674, 2709-11, 2755-57, 3202-03, 3205-06, 3379-81. The purchase agreement for the Odessa station was expressly made contingent on NMTV's ability to establish compliance with the multiple ownership rules.[21]

94. Our examination of the Odessa application (TBF Exh. 101, Tab Q at 31-36) (and the substantially similar Portland and Wilmington applications), however, indicates that it does not contain a full disclosure of relevant facts. The exhibit purporting to demonstrate compliance with the multiple ownership rules states merely that "a majority of its directors are

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[20] As noted above, the ALJ found that Crouch's effort to modify his testimony in this regard in an attempt to shift the blame for nondisclosure to May was not credible. 10 FCC Rcd at 12030 ¶ 65.

[21] The agreement stated:

> . . . Buyer's President, Paul F. Crouch, however, is an officer and director of [TBN-related entities], which in the aggregate hold interests in the maximum number of television facilities permitted by non-minority controlled organizations under Commission Rule 73.3555. 47 C.F.R. § 73.3555. Accordingly, buyer will be required to establish compliance with [the rule], before the assignment specified herein can be approved by the FCC. Buyer further represents and warrants that it will take any and all reasonable steps to establish compliance with Commission Rule 73.3555, 47 C.F.R. § 73.3555 . . . ; however, in the event the FCC does not approve the assignment for reasons associated with Rule 73.3555, and its interpretation and/or application thereof, then this Agreement shall automatically become void, and Buyer and Seller shall be relieved of any and all obligations to the other whatsoever without liability.

TBF Exh. 101, Tab Q at 12-13.

minorities, and National Minority TV, Inc. is therefore minority controlled and in compliance with rule 73.3555(d)(1)." Id. at 33. It does not acknowledge that there is even a question of whether NMTV should be deemed minority controlled despite the involvement of TBN in its affairs. Moreover, the facts set forth in the application were not complete or fully accurate. The exhibit reflected that Crouch was an officer of TBN but not that he was also its president and a director. Id. at 35. It stated that Duff had an interest in CET (TBN's educational television affiliate), but did not indicate that she was an employee with the second highest management office in TBN. Id. at 36. It made no mention of other aspects of the relationship between NMTV and TBN -- e.g., that they had the same address and that TBN would provide financing and accounting and engineering services. The application did not indicate that TBN would supply programming in the future. Id. at 30. (The exhibit also contained the erroneous statement that NMTV had the same three officers and directors since its organization. May testified that in preparing the exhibit he relied on an outdated file that did not reflect that TBN officials Terrence Hickey and Philip Crouch had served as assistant secretaries of NMTV. Tr. 3538-40, 3595-97.)

95. We note, as Trinity points out, that additional disclosures were made after the filing of the application. May testified that, during the pendency of the Odessa application, he had several conversations with Alan Glasser, the Commission staff attorney responsible for processing the application. TBF Exh. 105 at 16-17. May does not indicate that he took the initiative in coming forward to supplement the information presented in the application. Rather, the discussions apparently occurred because Glasser had:

> dealt with a number of other petitions and projects that Dr. Crouch was involved in, [a]nd so, in some sense, I think he felt as if he had a pretty good understanding or knew Dr. Crouch and knew the Trinity organization.

Tr. 3232. During the conversations, Glasser "would inquire about things like . . . . is Trinity going to provide the programming?" Id. May relates that he told Glasser during these sessions that Duff was an employee of TBN and that the Odessa station would carry TBN programming. Tr. 3232-33, 3236. May also relates that he informed Glasser that NMTV's financial certification was based on a commitment from TBN (although he did not mention other aspects of the relationship such as the fact that TBN was furnishing an open line of credit and accounting services). Tr. 3233-34, 3238.

96. Trinity asserts that these disclosures rebut any inference that TBN's principals intended to abuse the Commission's processes. It maintains that May's dealings with Glasser

do not provide any reason to fault his candor during these sessions.[22] It further asserts that these disclosures did not prompt the Bureau to pursue a formal inquiry into de facto control. The Bureau merely requested additional information from NMTV to make certain that each of the three listed directors had equal voting rights in the corporation. Id. May responded to the Bureau's informal request, submitting copies of NMTV's articles of incorporation, bylaws, and organizational minutes. TBF Exh. 105, Tab. Q. In his cover letter, May stated: "NMTV is governed by the majority action of its directors, unanimous votes are not required." Id. at 1. The Bureau thereupon approved NMTV's application.

97. We accept Trinity's point that, at least in hindsight, the Bureau might have followed up Glasser's discussions with May more vigorously. We also have no basis to fault May's conduct toward Glasser. Any shortcomings by the Bureau in this regard, however, do not provide a basis to absolve the parties for their failure in the NMTV application to fully disclose the relevant facts in the first place.

> The FCC . . . . must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known.

RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981). Unlike the applicant in Fox, Crouch and May did not affirmatively seek to bring the material facts to the Commission's attention so that the Commission could "vet" the proposed transaction. See Fox, 10 FCC Rcd at 8490 ¶ 93. On the contrary, rather than the parties voluntarily presenting the Commission with the pertinent facts, it appears that May's belated disclosures were prompted by Glasser's probing based on his prior familiarity with TBN.

98. Moreover, subsequent representations by NMTV do not evidence the candor May assertedly showed Glasser. For example, NMTV's opposition to petitions to deny its application to acquire the Wilmington station stated that (MMB Exh. 353 at 10-11, 17):

> NMTV has its own bank accounts from which it pays its own employees and other creditors, and has its own revenues, from the sale of broadcast time and spots. NMTV receives its own

[22] Glasser (who is now deceased) did not testify in this proceeding. However, the record contains an account of an interview with Glasser reported in a January 28, 1989 article in the Los Angeles Times (TBF Exh. 105, Tab R), which was received into evidence as relevant to May's state of mind. Tr. 678. After the close of the record, TBN submitted a sworn declaration by Glasser in an attempt to further bolster its case.

> contributions as a recognized 501(c)(3) organization. It is qualified to do business in California, Texas, and Oregon, is in good standing [footnote omitted], and has regular meetings of the board of directors at which corporate business is discussed and voted upon. NMTV also has its own employee policies and its own health insurance coverage.
>
> . . . .
>
> NMTV is a ten-year old organization which has operated two broadcast stations separated by 1500 miles. It receives its own revenue, and, as an exempt corporation, its own contributions. It is qualified to do business in three states. . . . It hires and fires its own employees, has its own employee policies, and has its own insurance. It files its own tax returns. It pays its own bills.

These statements significantly distort the actual relationship between TBN and NMTV, as described in detail in our discussion of de facto control. By way of example, while NMTV files its own tax returns in the sense that individual tax returns are prepared for NMTV, this is done by TBN accounting personnel and an accounting firm shared with TBN. Similarly, while NMTV has its own employee policies and insurance, were merely copied from TBN's.[23]

99. Moreover, the record demonstrates that Crouch had been advised that compliance the Commission's policies required that actual control of NMTV be in the hands of NMTV's directors and could not be exercised by TBN or Crouch. See Paragraph 91, supra. Yet, as discussed in the de facto control section, the record shows that at the time of the Wilmington and Portland applications and NMTV's response to the petition to deny, TBN and Crouch

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[23] Other representations questioned by TBF's opponents have less significance. NMTV stated (MMB Exh. 353 at 26) that "the cornerstone of NMTV's funding to acquire WTGI-TV is its December 7, 1990 letter from the Bank of California. . . . " Testimony indicates that the letter was a mere formality and that the loan would actually be made by TBN. Tr. 2118-19. In context, however, the statement related to allegations made about whether fundraising would be used to finance the acquisition -- allegations as to which the source of the loan was not material. MMB Exh. 353 at 23-24, 26. Moreover, the testimony in question explained that the bank loan was intended to conceal TBN's commitment from the seller (which might have viewed TBN's "deep pocket" as a basis to raise the price), not from the Commission. Tr. 2119. In any event, to the extent that there was ambiguity, TBN's role in financing the acquisition was timely disclosed in response to a subsequent Commission inquiry. TBF Exh. 121 at 16. Additional statements discussed by TBF's opponents are not significant enough to merit separate comment.

exercised de facto control over virtually all aspects of NMTV's actual operations, including the prior decisions with respect to the Odessa and Portland stations, as discussed above. Thus, if there were any doubt as to whether the structural relationship between NMTV and TBN at the time the Odessa stations was acquired subverted the minority ownership policies, the actual operation of the Odessa and subsequent stations confirms the abusive nature of their ownership by NMTV.

100. Conclusion. As to the full power applications and the exception to the multiple ownership rules, we find that NMTV was in violation of our rules and that the record indicates that Crouch and others were aware that there was a need to make full disclosure to the Commission because of the circumstances surrounding NMTV's claim of minority control. NMTV's applications, however, contain no mention of the material facts that would have alerted the Commission to these circumstances. We conclude that these omissions were deliberate and deceptive. Although May apparently did not lie when questioned directly by the Bureau's processing staff, the principals' underlying lack of candor at the outset is not negated by the absence of a more searching inquiry. Moreover, the record indicates that the principals' subsequent adherence to their questionable theory in pleadings was also lacking in candor and that the actual operation of the stations was inconsistent with the minority ownership policies as understood by the principals. Accordingly, based on the application and the circumstances surrounding its filing, and the manner in which the NMTV stations were actually operated, we find that the ALJ correctly concluded that the principals did not intend to apprise the Commission of questions concerning NMTV's eligibility or operate the stations consistently with the Commission's minority ownership policies. In the final analysis, the record shows that Crouch and his associates abused the Commission's processes by claiming that NMTV was a minority entity despite the circumstances indicating otherwise, that they were not forthright about this in the relevant applications, and that they did not intend to comply with Commission policy in the operation of the stations.

101. Turning to the factors relevant to assessing the seriousness of misconduct, we find that TBF's application for license renewal should be denied. See Character Qualifications, 102 FCC 2d 1179, 1227-29 ¶¶ 102-06 (1986). Abuse of process is serious willful misconduct which directly threatens the integrity of the Commission's licensing processes. Id. at 1211 ¶ 62. The misconduct was committed at the highest levels of the licensee's organization and involved several different applications. In mitigation, it is relevant that the legal issues involved were not totally free of ambiguity and the licensee did have the advice of counsel. We conclude that the loss of a single station license is an adequate and appropriate deterrent to any repetition of this conduct by the principals here. Accordingly, we conclude that, absent further information, these matters will warrant no further consideration in any future proceedings.

102. In our analysis, we have treated Crouch's past record of compliance with

Commission rules and policies as essentially neutral. Questions regarding his conduct were considered in International Panorama TV, Inc. (KTBN-TV), FCC 83D-4 (ALJ Jan. 25, 1983) (SALAD Exh. 35). Timothy Flynn, a former TBN official, improperly conducted ascertainment surveys in connection with an application, and falsely represented in the application how the surveys had been conducted. The ALJ in that case faulted Crouch for delegating excessive responsibility to Flynn but exonerated Crouch of any dishonesty. Thus, while the instant misconduct does not reflect an extension of a pattern of deceptive practices, it does involve a further failure by Crouch to ensure compliance with Commission rules and policies.

V. ISSUES REGARDING GLENDALE

Misrepresentation and Lack of Candor

Initial Decision

103. The ALJ found that Glendale's 51 percent stockholder, George Gardner (Gardner) did not make misrepresentations or lack candor before the Commission in connection with applications for extension of time to construct filed by a company he owns called Raystay Co. (Raystay). 10 FCC Rcd at 12046 ¶ 210. For the reasons set forth below, we will reverse that finding and disqualify Glendale.

104. In March 1989, Raystay, which also owns several cable systems, filed applications for authority to construct five LPTV stations, all in Pennsylvania. Two were to be located in Lancaster, with their transmitters co-located atop a structure owned by the Ready Mixed Concrete Company. Two others would be located in Lebanon, with their antennas co-located on the Quality Inn Hotel. A fifth application, in Red Lion, would have an antenna located on property owned by Raystay. Id. at 12047 ¶ 216. The Commission granted the five construction permits to Raystay on July 24, 1990, specifying an expiration date for the permits of January 24, 1992. 10 FCC Rcd at 12047 ¶ 218. The ALJ found that, after grant of the permits, Gardner appointed Harold Etsell (Etsell), a vice president of Raystay, to oversee the development of the five LPTV stations. On February 12, 1991, Etsell prepared a "Low Power TV Business Plan," in which he proposed that the five stations would be linked with W40AF (TV40), Dillsburg, Pennsylvania, an existing LPTV station licensed to Raystay, in a network to provide an alternative movie service supplemented by local programming of interest to cable subscribers. The plan was premised on cable carriage, and the ALJ found that both Etsell and Gardner considered that cable carriage was necessary for the five stations to be viable. Id. at 12047 ¶¶ 215, 219-20.

105. The ALJ found that, although cable operators in the area expressed interest in Etsell's concept, Raystay obtained no commitments from cable operators. 10 FCC Rcd at

12047 ¶ 221. According to the ALJ, in the absence of a viable business plan, Gardner was unwilling to proceed with the construction of the five LPTV stations, especially since his existing LPTV station, TV40, had been losing money. Id. at 12047 ¶ 222. The ALJ found that, in early 1991, Gardner asked Etsell to devote fulltime to GH Cable Properties, another co-owned business. At about the same time, in May 1991, Raystay entered into an agreement with Quality Family Companies (Quality), under which Raystay would grant Quality exclusive rights to air programming on the LPTV stations, subject to Raystay's authority over the operation of the station. Quality agreed to lease or purchase all equipment necessary to make the stations operational and to make specified monthly payments. Programming was to begin on August 31, 1991, but the agreement was terminated in August 1991 when Quality failed to make required payments. Id. at 12050 ¶ 246 & n.36.

106. The ALJ found that Raystay had also had discussions with three parties concerning the possible sale of one or more of the LPTV construction permits. He found that in March or April 1991, Gardner received an inquiry from Dennis Grolman (Grolman) expressing an interest in one or more of the LPTV permits. Discussions with Grolman broke off after Raystay entered into the Quality agreement. 10 FCC Rcd at 12052 ¶ 259. When the Quality agreement was terminated, the discussions resumed, with Lee H. Sandifer (Sandifer), a vice president of Raystay. By now, Grolman was interested only in the Red Lion permit. Sandifer and Grolman agreed to a sale of the Red Lion permit on October 10, 1991 for $10,000. Id. at 12047 ¶ 214, 12052-53 ¶¶ 259, 264-67.

107. The ALJ found that TBN sent Raystay letters expressing an interest in purchasing the construction permits. After the Quality agreement fell through, Sandifer authorized Gardner's son David to enter into discussions with TBN. Although not an officer of Raystay, David Gardner was involved in Raystay's affairs as an employee of Waymaker Company, a company also owned by Gardner, which provides management services to Raystay. Raystay made an offer to sell TBN TV 40 and the permits for $400,000. TBN made a counteroffer of $150,000 for TV40 and $5,000 each for the five other LPTVs, which Gardner rejected. On November 11, 1991, TBN sent Raystay a purchase agreement and applications contemplating the sale of the five LPTV's. On December 3, 1991, Gardner instructed Sandifer and David Gardner to discontinue negotiations with TBN. The ALJ found that Gardner had done so because he planned to file the Glendale application. 10 FCC Rcd at 12046 ¶¶ 211-13, 12052 ¶ 257.

108. According to the ALJ, around October 1991, Raystay also had discussions with Robert Shaffner about the possibility of Raystay acquiring Shaffner's cable system and using TV40 as partial payment. In late 1991, there were discussions about Shaffner possibly purchasing TV40 and the construction permits, contingent on Shaffner entering into a deal with a third party, which, however, fell through in December 1991. 10 FCC Rcd at 12052 ¶ 258.

109. By December 1991, Raystay had not started construction of the facilities. On December 20, 1991, Raystay filed separate applications for extension of each of the four Lancaster and Lebanon permits. Preparation of the applications was arranged by David Gardner, who provided information to the applications' draftsman, John Schauble (Schauble) of the law firm of Cohen and Berfield. After David Gardner reviewed the applications, he sent them to Sandifer, who reviewed them and sent them on to Gardner. Gardner reviewed the applications and signed them. 10 FCC Rcd at 12048 ¶¶ 223-29.

110. Exhibit 1 of each application contained Raystay's rationale for requesting the extension. The exhibits read in their entirety (TBF Exh. 245 at 3-4, 7-8, 11-12, 15-16):

> The permittee respectfully submits that a grant of the instant application would be in the public interest for the following reasons:
>
> Initially, it must be noted that Raystay Co. has built and is currently the licensee of LPTV station W40AF licensed to Dillsburg, PA. Raystay built the station pursuant to a construction permit issued to it by the Commission.
>
> At the present time, equipment for the station has not been ordered or delivered. Raystay, however, has had discussions with equipment suppliers concerning the types and prices of equipment that could be used at the site specified in the construction permit. It has entered into lease negotiations with representatives of the owners of the antenna site specified in the applications, although these negotiations have not been consummated. A representative of Raystay and an engineer visited the antenna site and ascertained what site preparation work and modifications need to be done at the site.
>
> Raystay has undertaken research in an effort to determine the programming that would be offered on the station. It has had discussions with program suppliers to determine what programs could be available for broadcast on the station. It has also had continuing negotiations with local cable franchises to ascertain what type of programming would enable the station to be carried on local cable systems.
>
> The denial of this extension request could eliminate any

> possibility of the proposed LPTV service being offered to the community. No application mutually exclusive with Raystay's construction permit application was filed, so no other entity has expressed an interest in providing this service.
>
> Accordingly, Raystay requests that the Commission extend the date for construction for a period of six months from the date this application is granted or the date the current construction permit expires, whichever is later.

The Bureau, without asking for additional information, granted the extensions on January 29, 1992, with the permits now to expire on July 29, 1992. 10 FCC Rcd at 12048 ¶ 229.

111. By July 1992, Raystay had still not started any construction. In June, Schauble wrote to David Gardner saying that he would prepare a new exhibit for a new set of extension applications if Raystay had done additional planning to get the stations on the air, otherwise he would use the existing exhibit. After discussions with David Gardner, Schauble sent him applications containing the same Exhibit 1 used in the December 1991 application. David Gardner sent the applications directly to Gardner, because Sandifer was on vacation. The ALJ found that Gardner signed the applications not realizing that Exhibit 1 was the same as before. On September 23, 1992, the Bureau, without asking for additional information, granted extensions until March 23, 1993. 10 FCC Rcd at 12051 ¶¶ 247-49.

112. The ALJ considered allegations that Exhibit 1 contained misrepresentations or was lacking in candor. He found that the exhibit candidly admitted that construction had not been started, which he considered the most important factor under the Commission's rules. 10 FCC Rcd at 12063 ¶ 339. He found that with respect to most of the statements in the Exhibit there was no real dispute as to their accuracy. Thus he found that: (1) David and George Gardner had discussions with equipment suppliers; (2) David Gardner and an engineer had visited the proposed transmitter sites; and (3) Raystay had undertaken research to find programming for the station. Id. at 12063 ¶¶ 339-40.

113. Only one statement in the exhibit troubled the ALJ -- the claim that Raystay had "entered into lease negotiations" with the owners of the proposed transmitter sites. The ALJ observed that this statement referred to two one-minute phone calls that David Gardner had with representatives of the site owners. The ALJ concluded, however, that, while it was questionable to characterize these brief discussions as "negotiations," there had been no intent to deceive the Commission and the statement was a mere exaggeration. 10 FCC Rcd at 12063-64 ¶¶ 341-42.

114. The ALJ also found no intent to deceive in Raystay's using the same Exhibit 1

in its second extension requests as it had in the first requests. In the ALJ's view, the Bureau must have known that the exhibits were identical and that Raystay had not satisfied the criteria for an extension (because no construction had been undertaken) and, therefore, could not have been deceived. 10 FCC Rcd at 12064 ¶ 343. The ALJ held that Raystay never abandoned its intent to build the stations, and had little to gain from selling the unbuilt stations, but even if it intended to sell them, this would not be improper. Id. at 12064 ¶¶ 344-46. The ALJ concluded that even if the statement regarding lease negotiations was considered untrue, Gardner had no reason to know that it was false. Id. at 12065 ¶ 349.

Exceptions and Replies

115. TBF and the Bureau contend that Exhibit 1 reflected disqualifying lack of candor and misrepresentation. They assert that the Exhibit gives the false impression that Raystay was actively working towards the construction of the stations when, in fact, George Gardner had no plans at that time to construct the stations and was intending to sell them. They also assert that specific statements in the exhibit were false. They argue in particular that: (1) Raystay was not engaged in any "lease negotiations" regarding the transmitter sites; (2) the exhibit gave the false impression that an engineer visited the sites on behalf of Raystay, when it was actually a TBN engineer who visited the sites; (3) there were no "continuing negotiations" with cable franchisees at the time the extension application was filed; and (4) contrary to the exhibit, other entities, such as TBN, were interested in the facilities. TBF and the Bureau maintain that Gardner knew he had no plans to construct and could appreciate the false impression that the exhibit conveyed and observe that he had previously been found to have lacked candor in an earlier Commission proceeding, RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642, 644 (1990).

116. Glendale replies that the initial decision correctly resolved this issue. It insists that the statements made in the exhibit were substantially accurate. It further insists that Gardner never abandoned his intention to find a viable plan to construct and operate the stations. According to Glendale, Gardner would not have sought an extension for the purpose of selling the stations.

Discussion

117. We find that Exhibit 1 reflects a significant lack of candor. We expect licensees to represent truthfully to the Commission their intentions and the reasons for their actions. See KQED, Inc., 5 FCC Rcd 1784, 1784-85 ¶¶ 3-5 (1990), recon. denied, 6 FCC Rcd 625 (1991). Exhibit 1 does not do so. We reach this conclusion, although we agree with the ALJ that Exhibit 1 on its face provided no basis for granting an extension. Under 47 C.F.R. § 73.3534(b), extensions of time to construct broadcast stations will be granted under only three circumstances:

> (1) Construction is complete and testing is underway looking toward prompt filing of a license application;
>
> (2) Substantial progress has been made i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; and
>
> (3) No progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all steps to expeditiously resolve the problem and proceed with construction.

Exhibit 1 clearly does not attempt to comply with any of these provisions. It does not seek to show that construction had been completed, that substantial progress had been made, or that lack of progress was due to circumstances clearly beyond Raystay's control. The record provides no indication of why the Bureau relieved Raystay of its obligations under the rule.

118. The fact that the Bureau seemingly ignored the problematic nature of Exhibit 1, however, does not provide a basis to conclude that the exhibit raises no question of candor. It is true that Raystay did not conceal its failure to make substantial progress toward construction of the stations and that the Bureau could have denied the extension applications based on that acknowledged defect. However, Exhibit 1 was clearly intended to persuade the Bureau to grant an extension anyway, and Raystay was obliged to be truthful in its representations, whether its exhibits were consistent with the rule or not.

119. We disagree with the ALJ's conclusion that Raystay's representations concerning the specific factors cited in support of the extension requests were substantially accurate. Raystay had not "entered into lease negotiations" with the site owners. David Gardner testified that this statement was based on events that occurred while he was engaged in negotiations with TBN in October 1991 concerning the possible sale of the permits. Glendale Exh. 209 at 4-5. He stated that TBN asked whether one of its engineers, Tom Riley (Riley), could inspect the sites. Accordingly, David Gardner called the Ready Mixed Concrete Company and the Quality Inn and asked whether sites were still available and whether Riley could inspect them. Telephone records for October 10, 1991 indicate that the calls lasted one minute each. Id. at 4, 9. These one minute calls were the "lease negotiations" that Exhibit 1 refers to and during which, according to a June 3, 1993 declaration by David Gardner (TBF Exh. 246 at 1), he "generally discussed possible lease terms." David Gardner's hearing testimony indicates that the "lease terms" referred to were whether the site was available. Tr. 4724-26. These calls cannot fairly be described as "lease negotiations." Similarly, David Gardner indicated that Exhibit 1's assertion that "A representative of Raystay and an engineer

have visited the antenna site" refers to Riley's visits and his own, which were not at the same time. Glendale Exh. 209 at 5-6. The obvious implication of Exhibit 1, however, is that a Raystay representative accompanied an engineer to the sites in connection with Raystay's construction plans. In fact, Riley's visit had to do with TBN's possible purchase of the permits and not at all with any construction efforts by Raystay, and the representation is misleading.

120. The representation that Raystay has "had continuing negotiations with cable television franchises. . ." is at best an exaggeration. The direct written testimony of both George and David Gardner indicates that this representation refers to the discussions that Etsell had with cable operators in connection with his "Low Power TV Plan," which are indeed the closest to anything that can fairly be described as "continuing negotiations." Glendale Exhs. 208 at 5-6, 209 at 6. See also TBF Exh. 210 (the low power TV plan). These contacts and work on the plan, however, terminated some nine months before the first extension application. TBF Exh. 265 at 51-66. (At the hearing, George and David Gardner also attempted to characterize their sporadic contacts with cable operators as "continuing negotiations." Tr. 4815, 4926-28, 55235, 5264-65. However, there is nothing about this testimony that would support a finding that Etsell's Plan had again become a plausible approach.) The underlying problem with the claim of "continuing negotiations" is that, as Gardner testified, the true and undisclosed significance of Exhibit 1's paragraph about the contacts with programmers and cable operators is that they resulted in no viable business plan. Tr. 5272-743. To Gardner, the paragraph explains why construction was not begun. Id. To an uninformed reader and apparently the Bureau, however, the paragraph appears to do just the opposite -- i.e., to give assurance that Raystay was taking steps leading toward construction.

121. Also problematic is Raystay's representation that "No application mutually exclusive with Raystay's construction permit application was filed, so no other entity has expressed an interest in providing this service." Given the interest expressed by TBN and others in purchasing the construction permits, this statement is misleading. Although the statement is not literally false in that no mutually exclusive applicants expressed an interest to the Commission, Raystay was aware that other parties -- i.e., potential buyers -- were interested in operating the facilities, a fact inconsistent with Exhibit 1's assertion that denial of the extension requests could eliminate any possibility of the proposed LPTV service. The potential buyers may well have applied if the frequency were vacant. Thus, the statement clearly left the reader with an inaccurate impression.

122. The problem with Exhibit 1, however, goes beyond these specific deficiencies. Taken as a whole, Exhibit 1 was intended to leave an impression that was manifestly false -- namely, that Raystay had a good faith intention to proceed diligently with construction of the stations. This intent, which can be discerned from a fair reading of the exhibit, is confirmed

by a letter concerning preparation of the second extension application from Schauble to David Gardner. Schauble wrote: "Please let me know if any additional planning has been done that we can use to convince the Commission that Raystay has been diligent in working to get the stations on the air." TBF Exh. 249. The Bureau also seems to have understood Raystay's request in that light. In granting the second extension, the Bureau wrote (TBF Exh. 252):

> In support of your request, you state that Raystay has entered into negotiations with representatives of the owners of the antenna sites specified in these applications. You also state [that] Raystay has undertaken research in an effort to determine programming. Based on these facts, the Commission has decided to afford Raystay a final opportunity to complete construction. These applications will be granted for an additional six months. Raystay is cautioned, however, that the Commission does not expect to grant any additional extensions of time or assignments of the construction permits.

The Bureau's expectation that Raystay would complete construction within six months implies that the extension was granted based on a belief that Raystay was committed to proceed with construction.

123. Viewed in this light, Exhibit 1 deceived the Bureau as to the reasons for Raystay's actions and its intentions. The record leaves no doubt that, at the time that Raystay filed its extension applications, Gardner had no present intention to proceed with construction of the stations. A finding to this effect does not depend, as Glendale asserts, on a selective reading of the record. Gardner testified (Tr. 5270):

> My experience with TV40 [which was losing money] absolutely got in my way of doing anything without having a viable business plan. I had learned my lesson there. And there was no way that I was going to go ahead. I was urged by I believe Mr. Etsell to go ahead with them without having everything in place. But I resisted that.

See also Tr. 5235-38, 5274, 5280-81. He further testified that he had "no idea" of when -- or if -- construction of the stations would begin or he would develop a viable plan. Tr. 5236-37, 5276, 5281. In this regard, he explained (Tr. 5277-78):

> Well I can't see the future that well. The reason we applied for these construction permits in the first place was to put them on the air. And my difficulty with TV40 caused me to go much

> slower than I would have if I hadn't had the TV40 experience.
>
> But we were still hopeful that we would find a way to make it work. We did dedicate a lot of time to it. And we had several situations that I felt were going fairly well. And the application for extension was something that we needed to do.
>
> And we not only had the business plan that we're talking about with the cable systems, but we had Mr. Shaffner who was going to take TV40 off our hands. And I was interested in preserving the construction permits in the event that he wanted those. We had certainly a situation with Trinity that I had to back out of. But that didn't mean to me that Trinity was the only group that would have been interested in taking TV40 and probably be interested in the CPs along with it.
>
> I thought our plan was pretty good. We just couldn't find a way to implement it. But that didn't at that time mean to me that no one else was going to put a plan together.

124. This testimony indicates that Gardner had no foreseeable prospect of finding a viable plan or of beginning construction of the station. He had at most an indefinite hope that something would turn up -- and most likely this would be the sale of the permits.[24] Gardner had told Etsell months before the extension applications were filed to suspend his work on his low power TV business plan. TBF Exh. 265 at 66. The record contains no indication that the plan was ever revived as a viable prospect. For example, in October 1992, after the extensions had been granted, David Gardner suggested that, rather than relying on cable carriage, the LPTV stations could be used to provide multi-channel service as an alternative to wired cable. Glendale Exh. 221; Tr. 4948. The Quality programming deal had fallen through as had sales negotiations with Shaffner and TBN. The only matter that came to fruition was the sale of the Red Lion permit. In the absence of a viable business plan, no funds were budgeted for development of the LPTV stations. Tr. 5104-05, 5237-38. When Raystay refinanced its business in July 1992, LPTV development was excluded from the scope of the

[24] The Commission has granted extension of a construction permit to permit sale where failure to complete construction was due to circumstances beyond the permittee's control. Beacon Radio, Inc., 18 FCC 2d 648, 649-50 ¶¶ 3-6 (1969). However, the permittee's failure to construct because of an economic judgement that the station was not viable did not warrant an extension to permit sale. Community Service Telecasters, Inc., 6 FCC Rcd 6026, 6027 ¶ 5, 6028 ¶¶ 7-8 (1991). Thus, the permittee's right or intention to sell the permit is not dispositive, it is the permittee's diligence in undertaking construction.

loan.[25] TBF Exhs. 261, 264 at 17-18, 261; Tr. 5058-62, 5086-87. Indeed, after Schauble told David Gardner that the Commission would not likely grant a third extension unless Raystay made substantial progress in constructing the stations and that the Commission would not likely allow sale of the permits, Raystay promptly surrendered the permits. TBF Exhs. 255, 256. As Gardner himself admitted in his testimony, the true reason that construction had not begun -- the absence of a business plan -- is "missing" from Exhibit 1. Tr. 5272-73.

125. We find that the lack of candor reflected in Exhibit 1 should be attributed to George Gardner. Although he may not have not have been fully aware of all of the facts underlying the specific statements in the exhibit (such as whether David Gardner had met with the site owners), he knew that he had no present intention of constructing the facilities and that other entities had, in fact expressed an interest in them. He therefore knew that the exhibit was misleading.

126. Gardner's candor has already been impugned in a prior Commission proceeding. In RKO General, Inc. (WAXY-FM), supra, Gardner was the principal of Adwave Company, an applicant for an FM station in Fort Lauderdale, Florida. As part of his diversification showing, he proposed to divest himself of Raystay's cable interests by placing them in trust. See also RKO General, Inc. (WAXY-FM), 4 FCC Rcd 4679 (Rev. Bd. 1989). The Commission noted that the Review Board had found that the proposal was lacking in candor because under the trust arrangement Gardner would retain almost all of the benefits of stock ownership including the right to participate in the management of the cable systems, 5 FCC Rcd at 643 ¶¶ 8-9, and could not fairly be described as a divestiture. Adwave entered into a settlement of the proceeding and asked for a Commission determination that the lack of candor finding would not bar Gardner from acquiring additional stations. Accepting the Board's findings as true, the Commission noted that the misconduct was an isolated transgression, which would not necessarily bar future broadcast ownership. It held that Gardner would be permitted to acquire additional stations on a showing that (1) he had not been involved in any further significant misconduct, (2) he enjoyed a reputation for good character in the community, and (3) he would undertake meaningful measures to prevent the future occurrence of FCC-related misconduct. The Commission also observed "Of course there should be no occurrence of misconduct in connection with the new application." 5 FCC Rcd at 644 ¶¶ 18-22. When he applied for the five LPTV facilities, Gardner proffered a

[25] The agreement did not preclude Gardner from seeking funds from alternative sources to undertake LPTV development, if he chose to do so. Tr. 5297, 5339-40. To the extent that the agreement reflects Gardner's intended course of action, it is consistent with the lack of a definite plan to construct, since Raystay negotiated provisions in the loan agreement that permitted either the transfer of its LPTV interests to an affiliate (so that Gardner could develop them) or sale to a third party. TBF Exh. 264 at 14, 20; Tr. 5087-90, 5182-83.

showing, which the Bureau accepted as adequate. TBF Exhs. 259-60.

127. Despite these assurances, Gardner has once again been found responsible for the type of deliberate misconduct for which he was previously admonished. Because we rely on the accuracy of representations to the Commission, lack of candor is a serious breach of a licensee's obligations. See WHW Enterprises, Inc., 753 F.2d 1132, 1139 (D.C. Cir. 1985); Character Qualifications, 102 FCC 2d 1179, 1211 ¶ 61 (1986). The repetition of such serious misconduct by Glendale's controlling principal even after he had been admonished to avoid such misconduct renders Glendale unqualified to become a Commission licensee. See Mid-Ohio Communications, Inc., 5 FCC Rcd 940 ¶ 5 (1990). See Character Qualifications, 102 FCC 2d at 1227-28 ¶ 102. Nevertheless, as in the case of TBF, we conclude that denial of a single station application is an adequate and appropriate deterrent to any repetition of this conduct by the principals here. Accordingly, we conclude that, absent further information, these matters will warrant no further consideration in any future proceedings.

VI. CONCLUSION

128. We have found that TBF's application for renewal of its license to operate WHFT(TV) should be denied and we have found Glendale unqualified to be a Commission licensee. Accordingly, both applications are denied and other matters need not be considered. Moreover, because we have found TBF unqualified, the settlement agreement, which is premised on the grant of TBF's application must be rejected. (Because Glendale's application would be dismissed under the settlement, Glendale's qualifications are not relevant to whether the settlement can be approved.) We will, therefore, deny the Joint Requests for Approval of Settlement Agreement now before us. However, since we have also found that the loss of station WHFT(TV) is a sufficient deterrent to future misconduct by TBN-related entities, the parties may submit an amended settlement covering the stations other than WHFT(TV). Without expressing any view on whether such a settlement agreement would be approved by the Commission, TBF's disqualification in this proceeding would be no bar to approval of any such settlement insofar as the settlement otherwise complies with all of our rules and policies.

VII. ORDERING CLAUSES

129. ACCORDINGLY, IT IS ORDERED, That, good cause having been shown, Consent Motions for Extension of Time, filed August 28, 1996, September 23, 1996, September 30, 1996, October 11, 1996, and November 21, 1996, by Glendale Broadcasting Company ARE GRANTED.

130. IT IS FURTHER ORDERED, That the Petition of Colby May for Leave to Intervene, to File Comments, and to Participate in Oral Argument, filed November 15, 1996, and the Request for Leave to File Reply in Support of Petition of Colby May for Leave to

Intervene, to File Comments, and to Participate in Oral Argument, filed January 13, 1997 ARE DENIED, and that the Comments of Intervenor Colby May in Response to Mass Media Bureau's Opposition to Motion to Vacate the Record on Improvidently Designated Issues, filed November 15, 1996, ARE ACCEPTED as an amicus brief.

131. IT IS FURTHER ORDERED, That the Request of National Minority T.V., Inc. for Leave to Reply to Opposition to Motion to Vacate, filed December 5, 1996, and the Request for Leave to File Reply Comments of Intervenor Colby May, filed January 13, 1997, ARE GRANTED, and the Motion to Vacate the Record on Improvidently Designated Issues, filed August 20, 1996 by Trinity Broadcasting of Florida, Inc, and Trinity Broadcasting Network, IS DENIED.

132. IT IS FURTHER ORDERED, That oral argument being unnecessary for the resolution of the matters before us, the Requests for Oral Argument, filed January 23, 1996, by Trinity Broadcasting of Florida, Inc, and Trinity Broadcasting Network, and February 28, 1996, by The Spanish American League Against Discrimination, ARE DENIED.

133. IT IS FURTHER ORDERED, That the Initial Decision of Administrative Law Judge Joseph Chachkin, FCC 95D-13 (Nov. 6, 1995) (10 FCC Rcd 12020) IS AFFIRMED in part and REVERSED in part, the application of Trinity Broadcasting of Florida, Inc. (File No. BRACT-911001LY) IS DENIED, and the application of Glendale Broadcasting Company (File No. BPCT-911227KE) IS DENIED.

134. IT IS FURTHER ORDERED, That (1) the Joint Request for Approval of Settlement Agreement, filed April 13, 1998, by Glendale Broadcasting Company, Maravillas Broadcasting Company, Trinity Broadcasting of Florida, Inc., Trinity Christian Center of Santa Ana, Inc., Trinity Broadcasting of New York, Inc., and National Minority T.V., Inc., (2) the Joint Request for Approval of Settlement Agreement, filed April 13, 1998, by The Spanish American League Against Discrimination, Trinity Broadcasting Network, Trinity Broadcasting of Florida, Inc., and National Minority T.V., Inc, (3) the Joint Request for Approval of Settlement Agreement, filed April 13, 1998, by the California State Conference of Branches of the NAACP, the Alaska/Oregon/Washington State Conference of Branches of the NAACP, Trinity Broadcasting Network, and National Minority TV, and (4) the Joint Request for Approval of Settlement Agreement, filed April 13, 1998, by the Spanish American League Against Discrimination, Trinity Broadcasting Network , Trinity Broadcasting of Florida, Inc., and National Minority T.V., Inc. ARE DENIED and the associated settlement agreements ARE REJECTED.

135. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

JOINT SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD AND COMMISSIONER GLORIA TRISTANI

The Commission has adopted a decision denying renewal of Trinity Broadcasting Network of Florida, Inc. for Station WHFT(TV) in Miami, Florida. We believe that this action is amply justified by the record in this proceeding, which shows that the principals of the licensee and its affiliate, Trinity Broadcasting Network, abused the Commission's minority ownership policies. That record demonstrates that Trinity formed an entity called National Minority TV, Inc. (NMTV) to acquire television authorizations as a minority-controlled applicant under provisions of the multiple ownership rules then in effect. The record further demonstrates that NMTV was not, in fact, minority-controlled but was actually controlled by Trinity and its principals, who concealed from the Commission the facts indicating that NMTV subverted the purposes of the minority ownership rules.

Our action underscores that the Commission will not countenance the abuse of its rules and policies. We have labored hard to ensure the creation of a national telecommunications system that serves the public interest to the fullest extent possible. We will not permit the public interest to be undermined by those who refuse to comply with the letter and spirit of our rules and policies. In particular, it is critically important for the Commission to protect the integrity of our rules and policies designed to promote the participation by people of all backgrounds in broadcasting. Those who believe, as we do, that the Commission should advance policies to promote participation by minorities and women in the broadcast industry, have an obligation to safeguard the integrity of those policies by enforcing against abuses and shams. Our intent in enacting these rules and policies has been to create real opportunities for those who, for too long, have been unjustly excluded from participation. We are pleased that the Commission has acted decisively to reaffirm that our minority ownership rules will serve this worthy goal and will not be used for the advantage of those not entitled to benefit by them.

STATEMENT OF COMMISSIONERS HAROLD W. FURCHTGOTT-ROTH AND MICHAEL K. POWELL, DISSENTING IN PART

In re: Trinity Broadcasting of Florida, Inc., Miami, Florida, MM Docket No. 93-75

We respectfully dissent from the Commission's finding that Trinity Broadcasting of Florida, Inc. ("TBF"), is "unqualified" to hold the license to operate television station WHFT. We are not persuaded that the finding of abuse of process that underlies this disqualification is warranted. Specifically, we take issue with two key conclusions in this *Order*. First, assuming that TBF's parent company, Trinity Broadcasting Network ("TBN") actually exercised *de facto* control of National Minority TV, Inc. ("NMTV"), we do not think that the legal definition of "minority-controlled" under the multiple ownership exception unambiguously included a *de facto* element applicable to NMTV. Second, we are not persuaded that the evidentiary record in this proceeding shows that TBN and its principals specifically intended in these full power television applications to deceive the Commission about control of NMTV.

As this *Order* acknowledges, our precedent clearly requires proof of a "specific intent to deceive" the Commission in order to make a finding of abuse of process.[1] Our precedent teaches that this "is not an easy matter to prove."[2] Today's decision finds an abuse of process on the basis of a record that shows, at most, legal uncertainty on the part of TBN's principals concerning the company's disclosure obligation and NMTV's status as a minority-controlled company. Such uncertainty, however, is quite a different thing from a particularized intent to deceive the Commission about the "true" facts of NMTV's situation and thereby willfully abuse its process.[3]

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[1] *See Order* at para. 83 (*citing* Evansville Skywave, Inc., 7 FCC Rcd 1699, 1702 n.10 (1992)).

[2] WWOR-TV, Inc., 7 FCC Rcd 636, 638 (1992) (internal quotation omitted).

[3] We emphasize that the finding of abuse of process is based on the assumption that TBF was affirmatively required to disclose the details of the relationship between NMTV and TBN in its initial application. There is no indication on this record that the parties failed to provide relevant information once the staff requested it; indeed, the record shows that TBN subsequently disclosed the additional facts regarding "control" upon which the Commission today relies. *See Order* at paras. 94-95. In this regard, the *Order* imposes an unduly high burden of initial disclosure upon applicants. *See id.* at para. 95 (rejecting subsequent disclosure as curative because TBN did not "[take] the initiative" to do so and because disclosure occurred as a response to questions asked by Commission staff). By making the

I.

Today's Order asserts "that Commission rules and precedent have always given fair notice that *de facto* control is required to take advantage of the special provision concerning minority ownership in the multiple ownership rules."[4] Close examination of the relevant legal sources, however, reveals that this assertion is unsustainable. There was at least some ambiguity on this score in the multiple ownership rules.[5] In similar circumstances, the Commission has given the benefit of the doubt to the licensee. *See Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995) (exonerating party of allegations of misrepresentation and lack of candor on grounds of party's reliance upon advice of counsel and unclear state of relevant law). We would follow that precedent here.

Much like the situation in *Fox Television*, counsel for TBN advised its client that, for purposes of the television applications, NMTV was "minority-controlled" within the meaning of the rule. This position was based on the fact that two-thirds of the members of NMTV's board of directors were minorities. Counsel could well have based this advice on a strict reading of the definition of "minority-controlled" in Section 73.3555(e)(3)(iii). That section provided that: "*Minority-controlled* means more than 50 percent owned by one or more members of a minority group." One could rationally interpret that definition to adopt an exclusively *de jure* test for minority-controlled: the existence of "control" would be determined by an objective percentage formula. Indeed, given that nothing in the text of the language mentions any *de facto* element of the definition, that would be a natural reading of the rule.

Moreover, language in the *Multiple Ownership Order* adopting the rule supports this reading of section 73.3555(e)(3)(iii). In that Order, the Commission explained that it was "adopting rules today which permit group owners of television and radio stations to utilize a maximum numerical cap of 14 stations provided that at least two of the stations in which they

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validity of subsequent disclosures turn on the reason why disclosure was made, the *Order* distorts what ought to be the real issue, *i.e.*, whether disclosure was made.

[4] *Order* at para. 86.

[5] Indeed, the Mass Media Bureau Trial Staff initially came to the same conclusion. *See* Mass Media Bureau Proposed Findings of Fact & Conclusions of Law, at 159.

hold cognizable interests are minority controlled."[6] The Commission continued:

> A question arises as to the proper definition of a minority owned station for the purposes of our multiple ownership rules. In this regard, we note that the Commission has adopted different standards of minority control depending on the mechanism used to foster its minority policies. In the context of multiple ownership policies, *we believe that a greater than 50 percent minority ownership interest is an appropriate and meaningful standard* for permitting increases to the rules adopted herein.[7]

This passage represents the *Multiple Ownership Order's* entire discussion of the definitional issue. Nothing in its language suggests that the Commission intended to apply a *de facto* control test in addition to the 50 percent test. Notably, the dissenting statement of Commissioner Dennis Patrick asserted -- without provoking any rebuttal -- that "[n]o concern is given as to whether the 51% majority owners will exert any influence on the station's programming or will have any control at all."[8] Thus, the *Multiple Ownership Order* and the definition of minority control that it adopted could reasonably be read to indicate that applicants need only demonstrate *de jure* control, *i.e.*, greater than 50 percent minority ownership.

In deciding to disqualify NMTV, this Order does not admit of any ambiguity with respect to the applicability of the element of *de facto* control to TBN's application. Instead, the *Order* asserts that a note appended to the multiple ownership rule makes clear that NMTV was required to prove actual control in addition to 51% percent minority ownership.[9] We are unconvinced that the presence of this note in section 73.3555 is sufficient to overcome the

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[6] Amendment to Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 100 FCC 2d 74, 94 (1985) (*herein after* "Multiple Ownership Order").

[7] 100 FCC 2d at 95 (footnotes omitted) (emphasis added).

[8] *Id.* at 104. While Commissioner Patrick's interpretation of the *Order* is of course not binding in any legal sense, it is nonetheless probative of the meaning of the *Order*. At a minimum, it shows that reasonable people such as the Commissioner could have read the *Order* and related rule as adopting a straight percentage test for companies that met the 51% level.

[9] *Order* at para. 86.

language of either the actual rule on "minority-controlled" or the *Multiple Ownership Order* regarding the existence of a *de facto* control test.

First, it is not clear that Note 1 applies to the definition of "minority-controlled" at all. Note 1 is appended to all of section 73.3555, not subsection 73.3555(e)(3)(iii) in particular. One thus could reasonably assume that the administrative gloss in Note 1 applies to those instances in section 73.3555 in which "control" is not otherwise defined, such as the TV duopoly rule.[10] It is, in fact, awkward to layer Note 1's explanation of "control" on top of the separate definition of "minority-controlled" in subsection 73.3555(e)(3)(iii); indeed, the definitional part of that regulation never uses the term "control." Moreover, the statements in subsection 73.355(e)(3)(iii) and the *Multiple Ownership Order* regarding the definition of minority control might colorably be thought to outweigh this addendum on the scale of legal authority.[11]

Even if Note 1 governed the meaning of "minority-controlled," the text of the note can not bear the weight with which the majority saddles it. Note 1 states that "the word 'control' as used herein is not *limited* to majority stock ownership, but *includes* actual working control." (emphasis added). This language does not necessarily reflect an intent to "prevent licensees from circumventing the limitations imposed by the multiple ownership rules by exercising actual control over stations over which they did not have legal control."[12] Rather, it could well be understood to manifest an attempt to explain that "control" *can* mean majority stock ownership, but that it can *also* mean actual working control, as determined on a case-by-case basis. That is, the Note could plausibly be interpreted to mean that if an entity fails the 51% ownership test, but can nevertheless show that minorities exercise actual working control over the entity, that entity would still qualify as minority-controlled. A 51% equity interest was thus a proxy for control, but control could also be demonstrated on a fact-specific, case-by-case basis where that test was not met. That is not the same thing, however, as requiring the application of a fact-specific, *de facto* control analysis in all cases.[13]

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[10] *See* 47 C.F.R. section 73.3555(e)(1).

[11] *Cf.* Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 Ga. L. Rev. 993, 994 (1995) (arguing that "courts should assign little, if any, weight to these examples of gloss").

[12] *Order* at para. 86.

[13] The *Order's* reliance on Southwest Texas Public Broadcasting Council, 85 FCC 2d 713 (1981), *see Order* at para. 86, is also misplaced. That decision sets forth a definition of

Next, the Commission argues that agency precedent "has always required minorities to exercise de facto control over 'minority-controlled' stations" and suggests that the Commission meant to follow this precedent in the *Multiple Ownership Order* by "mak[ing] specific reference" to the 1982 Policy Statement on *Minority Ownership in Broadcasting.*[14] Neither claim is borne out by the relevant documents.

We take the last point -- that the Commission intended to adhere to the "traditional" definition of minority controlled when it adopted the ownership preference -- first. The 1982 Policy Statement, upon which today's decision relies as proof of such adherence, was merely cited in a footnote. The footnote followed this sentence: "We note that the Commission has adopted different standards of minority control depending on the mechanism used to foster its minority policies."[15] The Commission reads too much into the fact of this citation. To be sure, the *Multiple Ownership Order* specifically referred to the Policy Statement, but only as an example of the varying definitions of minority-controlled in FCC administrative law. *There is no indication that this citation was meant to incorporate the Statement's definition of minority-controlled into the ownership exemption rules.* That citation thus provides no substantive pass-through to either the Policy Statement or the 1978 Policy Statement quoted therein. In fact, immediately after citing the 1982 Policy Statement, the *Multiple Ownership Order* went on to adopt an apparently independent standard based on the different "mechanism" at issue: "In the context of the multiple ownership policies, we believe that a greater than 50 percent minority ownership interest is an appropriate and meaningful standard."[16] The citation to the 1982 Statement serves to establish a contrast to the rule that

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"control" that is limited by its terms to the "determin[ation] whether an unauthorized transfer of control has occurred" under section 310(d) of the Communications Act. 85 FCC 2d at 715. As the quoted sentence states in full, *"[s]ection 310(d)* contemplates every form of control, actual or legal, direct or indirect, negative or affirmative, over basic operating policies." *Id.* (emphasis added). That statutory provision is not at issue here. Moreover, it stands to reason that in the context of unauthorized transfers the test for control might be exclusively *de facto.* Unauthorized transfers of control are rarely effected by overt, recorded acts like the transfer of stock; they are, by definition, *sub rosa*, a fact that practically requires the Commission to look beyond legal ownership.

[14] *Order* at para. 87.

[15] 100 FCC Rcd at para. 46.

[16] *Id.*

the Commission actually adopted in the *Multiple Ownership* item, not a corollary. The "meaningful standard" that the *Multiple Ownership* Commission adopted was, in its own words, a "greater than 50 percent minority ownership interest" standard, not the standard of the 1982 Policy Statement.[17]

In any event, close examination of the 1982 Policy Statement on *Minority Ownership in Broadcasting*,[18] which this Order cites as evidence that "Commission precedent has always required minorities to exercise de facto control over 'minority-controlled' stations,"[19] leads one to doubt, not to embrace, that proposition. *Minority Ownership in Broadcasting* presented the Commission's policy statement on minority tax certificates. In paragraph 7 of that statement, the Commission indicated that entities would be deemed qualified for tax certificates "where the minority ownership interest in the entity exceeded fifty percent *or* was controlling."[20] The paragraph does not state that minority interests must uniformly demonstrate actual control -- over and above satisfaction of the ownership percentage test -- in order to receive a preference. To read it that way is to ignore the clear disjunctive nature of the sentence.

Nor does paragraph 16 make such a statement. Although that paragraph indicates that control is a factor in issuing tax certificates, it does not clearly require parties affirmatively to show *de facto* control in all circumstances in order to claim a minority benefit.[21] Notably, the sentence in question refers to "minority ownership of and control in the entity below 51

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[17] *Cf. Order* at para. 87 n. 17 (asserting that "the Commission clearly intended to establish a 'meaningful standard' of control to ensure that minorities had actual control over the stations benefiting from its minority ownership policies").

[18] 92 FCC 2d 849 (1982).

[19] *Order* at para 87.

[20] 92 FCC 2d at 853 (emphasis added).

[21] For this reason, it is not surprising that the *Multiple Ownership Order* cited paragraph 16 only for the proposition that the Commission "has adopted different standards of minority control depending on the mechanism used to foster its minority policies, "as discussed above.

percent."[22] Reading "control" independently of "minority ownership" -- as the *Order* does by emphasizing the word "and"[23] -- makes no grammatical sense; it produces the odd phrase "control in the entity below 51 percent." The less strained reading of this language is that "control in the entity" refers back to the proxy of a 51% ownership interest. In other words, minority ownership of 51%, which in turn establishes control, should not be diminished by the transaction.

Finally, *William M. Barnard*[24] does not bolster the *Order*'s contention that *de facto* control has always been a general requirement for a finding of "minority-controlled." That case involved the granting of a tax certificate notwithstanding the fact that the minority ownership interest in the beneficiary entity was less than 51% -- specifically, 45.5%. It thus does not support the proposition that actual control is a general requirement for a finding of "minority-controlled." To the contrary, it indicates that, where the ownership interest is less than 51%, the Commission under its "traditional" approach will apply a *de facto* test in order to save the entity from automatic disqualification for minority-controlled status. More specifically, this case is about "the unique nature of limited partnerships," for that was the factor that caused the Commission to find "sufficient minority involvement" to warrant "issuance of a tax certificate" even though the percentage test was not met.[25] Even if the case applied to section 73.3555(e)(3)(iii),[26] that still would not mean that a *de facto* control test governed TBN's application, in which there was no question of failure to meet the percentage test.

In short, we find unpersuasive the evidence marshaled in the Order to show that Commission rules, notes, or precedent clearly required NMTV to make an affirmative *de facto*

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[22] *Id.* at 857.

[23] *Order* at para. 90.

[24] 44 RR 2d 525 (1978) (*cited* in Order at para. 89).

[25] 92 FCC 2d at para.8.

[26] *Barnard* involved the interpretation and application of the 1978 Policy Statement on minority ownership. As explained above, *the Multiple Ownership Order* never incorporated the definitional rule of the 1982 Policy Statement, much less that of the 1978 Policy Statement discussed in the 1982 Statement. The relevance of this case to the meaning of section 73.3555(e)(3)(iii) is thus difficult to see.

showing in its application. A reasonable attorney, as well as a reasonable layperson, might have read the regulation without being on clear notice that the minority control test included any such element in the context of the multiple ownership exemption. It certainly did not make clear that a *de facto* control showing was necessary when the percentage test was satisfied. In light of the foregoing, we cannot find that TBN's failure to make an initial and affirmative showing of *de facto* control constituted an abuse of process.

II.

The evidence cited in the *Order* to show that the principals of TBN may have been "aware that" NMTV's compliance with section 73.3555(e)(3)(iii) was "doubtful"[27] is insufficient to show that they possessed the requisite intent to deceive. At best, such evidence shows some amount of reservation about NMTV's technical status. But that is often the case in the legal arena, especially where, as here, an agency adopts different tests for different purposes. Notably, the only direct testimony in this record on the question of intent is that the principals believed that, notwithstanding TBN's interaction with NMTV, the nature of that relationship would *not* raise legal problems relating to *de facto* control so long as other practices to promote NMTV's independence were followed.[28]

In rejecting this direct testimony as to intent, today's decision states that the opinion of TBN counsel that NMTV qualified as minority-controlled "does not reflect a reasonable interpretation of Commission policy."[29] Given our analysis in Part I of the regulations in effect when the application was filed, we cannot say that this belief was unreasonable or clearly erroneous under the circumstances.

Moreover, the reasonableness of a party's belief is not the issue here. For abuse of process determinations, the relevant question is whether the party possessed a specific intent to deceive. Even if the definition of "minority-controlled" under the multiple ownership rules was unambiguous at the time of NMTV's filing (which, as explained above, it was not), that

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[27] *Order* at para.. 91; *see also id.* at para. 94 (faulting application for "not acknowledg[ing] that there is even *a question* of whether NMTV should be deemed minority controlled") (emphasis added); *id.* at para. 83 (concluding that the "claim of minority control was at best doubtful").

[28] Transcript at 3206, 3226, 3228, 3399-401, 3604.

[29] *Order* at para. 92.

does not establish that TBN specifically intended to deceive the Commission about matters relating to control of NMTV. The clarity of the law is not probative of the filers' intent. From the proposition that the Commission provided clear notice of a *de facto* control test, one might deduce, as an *objective* matter, that TBN *should have known* of the *de facto* control requirement. But that proposition tells us nothing about the *subjective* state of mind of TBN's principals (the essence of an intent standard) or what they *actually knew*. What a reasonable person should have known is not necessarily what a particular person knew. And abuse of process is not an objective question but a subjective one.

The Order's conclusions about intent, however, are based on speculation about what the majority feels the principals must have known, not on proof of what the principals did know. As discussed above, the Order's rejection of TBN counsel's direct testimony is based only on the "reasonableness" of that view, not on any evidence that he actually knew that NMTV did not meet the relevant tests and consciously endeavored to hide that from the Commission. Similarly, the Order asserts that TBN principal "Crouch. . . *could not have been* unaware that he dominated NMTV, that NMTV was not truly independent of TBN, and that there was no basis to claim otherwise."[30] Yet the Order points to no proof that he *was* aware of those things, or that he intentionally withheld those facts in order to perpetrate a fraud on the Commission. Whether the Commission finds the principals' belief that they had complied with the relevant rules to be with or "without foundation,"[31] the point is what the parties actually and specifically intended. On this score, the item adduces scant evidence.

In search of evidence on the intent question, the Order relies on a provision in one of TBN's purchase contracts that conditioned the contract on NMTV's compliance with the minority control rule.[32] It is commonplace, however, for commercial contracts to be conditioned on regulatory compliance or approval; such conditions are no admission of a subjective belief that the matters in question indeed fail to satisfy the relevant regulatory requirements.[33] Again, what this provision reflects is, at most, some lack of certitude about NMTV's status as a "minority-controlled" company within the meaning of the regulation. And again, this is not at all surprising given the case-by-case, fact-specific, multi-factored

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[30] *Id.*

[31] *Id.*

[32] *Id.* at para. 93 & n. 21.

[33] *Id.* at para. 92.

nature of the legal determination of *de facto* control -- if the parties even knew that was the test. Whatever its probative force, this contractual language is certainly not enough, in our view, to overcome the direct record testimony on intent given by the principals.

Finally, the Order suggests that the novelty of the question presented (the meaning of section 73.3555(e)(3)(iii) as applied to a nonprofit public charity) at the time of TBN's filing increased its burden of initial disclosure. This sword of an argument is double-edged, however. It could just as readily cut in favor of TBN on the intent question.[34] The fact that "the Commission had never before applied the provision to an arrangement"[35] such as NMTV's means that there was no precedent to guide the applicants in their filing. Notice therefore was less, not more, clear than the Commission argues it was. In light of the novelty of the issue, any failure by TBN to disclose certain information might seem less the product of an intent to deceive than of lack of guidance on the meaning of "minority-controlled" under the ownership exemption.

In short, the evidence adduced by the Commission does not persuade us that TBN possessed a specific intent to deceive the Commission with respect to control of NMTV, and we are aware of no other record evidence that demonstrates such intent. While intent to deceive certainly can be proven by circumstantial as opposed to direct evidence, the amount of circumstantial evidence of intent to deceive here is not particularly substantial. The only direct evidence on this issue is that the parties did not mean to deceive the Commission. On such a record, a finding of abuse of process is unwarranted.

* * *

To conclude, we think this Order errs in asserting that TBN was on clear notice of the applicability of a *de facto* control showing to its applications. We further believe that the record evidence in this proceeding is not sufficient to prove a specific intent to deceive the Commission. In these circumstances, we find that imposition of the "death penalty" of disqualification is both unfair and unwarranted.

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[34] The argument also contradicts the majority's earlier contention that the "traditional" definition of minority-controlled applied in the multiple ownership context. If that were true, then precedent on the meaning of section 73.3555 as applied to this case indeed would have existed.

[35] *Id.* at para. 93.